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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-672

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GRAY-GRIMES TOOL COMPANY, INC.,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Gray-Grimes Tool Company, Inc., by and through its attorneys, TRIPP, FREYDL, FRASCO & OLDANI, hereby responds to the Petition of the Solicitor General, on behalf of the National Labor Relations Board, for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit abused its discretion, by a gross misapplication of the applicable standard of review, in modifying the Board's remedy so that back pay would commence on the date of the Union's request for bargaining about the effects of closing on employees and terminate upon agreement or a bona fide impasse.

STATUTES INVOLVED

Respondent concurs with Petitioner's citation of certain sections of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 USC 151, et seq.), but would also cite §10(e) of the Act which provides in pertinent part, that the Courts of Appeals of the United States "shall have power . . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the Order of the Board."

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement but would add the following for the Court's consideration:

First, the Board found that Mr. Gray did not reach a final decision to close Gray-Grimes until the actual day of closing, November 27, 1974. (Petition, App A, p. 16a). Thus, giving the union advance notice of his intent to close would have been impossible.

Secondly, the Board found no *Fibreboard* [*Fibreboard Paper Products* v *NLRB*, 379 US 203, 57 LRRM 2609 (1964)] subcontracting on the part of Gray-Grimes following the closing; and, indeed, the Administrative Law Judge characterized Gray-Grimes' post-closing activities as "an aspect to closing down Gray-Grimes altogether." (Petition, App A, p. 18a). Nor did the Board regard the continued manufacturing of the Last Word product line by Twin Bay as "subcontracting" requiring bargaining with the Union (Petition, App A, p. 18a). The record shows that the agreement between Mr. Gray and Twin Bay was for Twin Bay to produce Last Word products that were formerly produced by Gray-Grimes (A. 23, 28-29, 53-54). Thus, Mr. Gray's decision to close Gray-Grimes' operation was final and he did not resume operations at a later date at the same location or elsewhere.

In addition, the record reflects that there was no further contact between Mr. Gray and the union after closing. No request for bargaining was made and no demands on behalf of the employees were submitted to Mr. Gray to test his willingness to discuss such matters (A. 124).

Other pertinent matters not reflected in the record are the following: On August 5, 1975, Mr. Steven Yokich, business representative of the union, made a written request to Mr. Gray to bargain regarding the effects of plant closing pursuant to the Administrative Law Judge's recommendations (Petition, App A, p. 23a). The company agreed and sessions were conducted on August 14, and August 17, 1975. On the latter date, an impasse was reached. Respondent's Counsel furnished minutes of

these sessions to Mr. David L. Basso, compliance officer of the National Labor Relations Board's Detroit office. Presumably, Petitioner is basing its footnote 4 on page 7 of its Petition ["4The Board has been advised that the union requested bargaining shortly after issuance of the Administrative Law Judge's decision (August 1, 1975), and that, according to the company, an impasse was reached shortly thereafter"] on the information supplied Mr. Basso. Obviously, the above information regarding bargaining is not part of the record since the events occurred in the wake of, and as a result of, the Administrative Law Judge's decision. However, the question of discretionary review precedes a consideration of the merits. Respondent feels that it is appropriate to inform the Court that ultimately the parties did bargain to an impasse over the effects of closing.

ARGUMENT

A. Considerations governing review on Writ of Certiorari of Court of Appeals decisions granting or denying National Labor Relations Board Orders.

Rule 19(1) (b) of this Court cites among the reasons for which review on Writ of Certiorari may be granted the situation "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or had decided an important question of federal law which has not been, but should be, settled by this court. . . ." The Solicitor General has obviously patterned his Petition in conformance with the above.

However, the companion cases of *NLRB* v *Pittsburgh SS Company*, 340 US 498, 95 L Ed 479, 71 S Ct 453 (1951); *Universal Camera Corp.* v *NLRB*, 340 US 474, 95 L Ed 456, 71 S Ct 456 (1950), appear to have narrowed this Court's scope of discretionary review of court of appeals decisions granting or denying labor board orders.

In the *Pittsburgh SS Co.* case, the Court said at 95 L Ed 482,

> . . .Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of labor board orders. "The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari. . ." Taft Hartley Act §10(e), 61 Stat 148, ch 120, 29 USC (Supp III) §160(e).
>
> Certiorari is granted only "in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Layne and Bowler Corp* v *Western Well Works*, 261 US 387, 393, 67 L Ed 712, 714, 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38(5).

Justice Frankfurter, after discussing the applicable standard of review of Board orders before the Courts of Appeals, stated in the *Universal Camera Corp.* case at 95 L Ed 469:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

The ultimate question before the Court appears to be whether the Sixth Circuit abused its discretion, by a gross misapplication of the applicable standard of review in modifying the Board's Order. Before reaching that question, it would appear that the Court must determine first that the issue is one of public importance and, secondly, that there is a real and embarrassing conflict of opinion and authority on the question among the courts of appeals.

B. The Solicitor General has failed to demonstrate that a "real and embarrassing conflict of opinion and authority" exists between the instant decision of the Sixth Circuit and the other court of appeals decisions cited.

The Solicitor General cites four cases as conflicting with the instant decision of the Sixth Circuit. They are: *NLRB* v *Drapery Mfg. Co.*, 425 F2d 1026, 74 LRRM 2055 (CA 8, 1970) enforcing in part 170 NLRB 1706, 68 LRRM 1027 (1968); *International Ladies Garment Workers Union* v *NLRB (McLoughlin Mfg. Corp.)*, 463

F2d 907, 80 LRRM 2716 (CA DC, 1972), modifying and enforcing 182 NLRB 958, 74 LRRM 1756 (1970); *Summit Tooling Co.*, 195 NLRB 479, enforced, 83 LRRM 2044 (CA 7, 1973); *NLRB* v *Winn-Dixie Stores, Inc.*, 361 F2d 512, 62 LRRM 2218 (CA 5, 1966), certiorari denied 385 US 935, enforcing 147 NLRB 788, 56 LRRM 1267 (1964). Admittedly, the Board's back pay orders in *Winn-Dixie and Summit Tooling* differ from the modified order of the Sixth Circuit in the instant case. There is, however, no conflict with regard to any issue of substantive law. Furthermore, there are important factual distinctions between the *Summit Tooling* and *Winn-Dixie* decisions and the instant case which justify the difference in remedies. On the other hand, the remedies provided in the *Drapery* and *Garment Workers* decisions are in accord with the Sixth Circuit's modification.

In *NLRB* v *Drapery Mfg. Co., Inc., supra*, Drapery Manufacturing, a manufacturer and installer of drapery, was found by the Board to be a single integrated employer along with American White Goods Co. Drapery Manufacturing terminated its operations on April 21, 1967, without advance notice and without an offer to bargain with the union over the closing or the effects of closing, 425 F2d 1027. Some four months later, the company belatedly offered to bargain with the union regarding the effect of closing upon the employees, 425 F2d 1028. While holding that Drapery Manufacturing was not obligated to bargain regarding its decision to close, the Eighth Circuit affirmed the Board's bargaining order regarding the effects of closing and its back pay order which ran from the date of closing, April 21, 1967, to the date the company offered to bargain over effects, August 1, 1967. This is a rather different remedy than that involved in the *Summit* and *Winn-Dixie* Decisions, to be

discussed *infra*. In those cases, and in the instant case, the Board ordered back-pay from the date of closing until either agreement, impasse, failure of the union to request bargaining within a specified time or the failure of the union to bargain in good faith. Implicit in the *Drapery* decision is the notion that it would have been inequitable and punitive to require back pay subsequent to the date the company stood ready and willing to bargain. Consequently, the Board fashioned its back pay remedy to fit the unique circumstances of the *Drapery* case. The Petition of the Solicitor General, on the other hand, seems to argue for the imposition of a uniform back-pay remedy applicable to all partial closing cases.

International Ladies Garment Workers Union v *NLRB (McLoughlin Mfg. Corp.), supra*, involved an Indiana manufacturing company which, in April of 1965, informed the union of its "irreversible decision to go out of business." At that time, unbeknownst to the union, the company was negotiating to relocate its plant to Alabama. The company went ahead and bargained with the union over the effects of the closing on its Indiana employees. By May of 1965, the company had made a firm decision to relocate, but the union remained in the dark until September of 1965 when the company finally admitted to the union its plans to relocate.

On these facts, the Board ordered the company to bargain regarding the effects of relocation and made the following back-pay order, at 74 LRRM 1760:

> Ordinarily, as set forth in *Winn-Dixie*, back-pay would not terminate until a future bargaining impasse. In the present case, however, the union learned of the transfer of operations by early September of 1965 but did not seek to bargain with the Respondents about the transfer or its effects. In these circumstances, we believe that it is equitable to terminate back pay at about this date, which we shall fix for convenience sake as September 1, 1965, rather than the usual impasse date.

The D.C. Circuit enforced the Board's order regarding the obligation to bargain over McLoughlin's decision to relocate and the effects of relocation on its employees, but modified the back-pay order by beginning liability on April 6, 1965, the date when the company falsely informed the union that it had made an irreversible decision to go out of business. The Circuit Court, however, affirmed the cut-off date for back pay liability which the Board had determined to be the time when the union learned of the transfer of operations in early September of 1965 but did not seek to bargain with the company about the transfer or its effects. It is mystifying that the Solicitor General could find this remedy similar in type to the Board's back-pay remedy in the instant case. It has far more in common with the modified remedy provided by the Sixth Circuit which commenced back-pay liability on the date the union, after long

silence, finally requested bargaining. In both decisions, equity and the particular circumstances involved determined the ultimate remedy, not an inflexible formula which the Solicitor General would apply in all circumstances involving partial closing.

The back-pay order in *NLRB* v *Winn-Dixie Stores, Inc., supra*, is identical to that provided by the Board in the instant case, i.e. it orders back pay from the date of plant closing until agreement, impasse, failure of the union to request bargaining, or failure of the union to bargain in good faith. The severity of the remedy in *Winn-Dixie* appeared to be due to the fact that the company had effectively refused to bargain for nearly five years from the time the union presented authorization cards in 1961. An earlier decision of the Board, 138 NLRB 1355, enf 324 F2d 502 (CA 5, 1963), had found *Winn-Dixie* guilty of 8(a) (1) and 8(a) (5) violations during the election campaign. The Company refused to comply with the Board's certification and bargaining order and discontinued operations shortly before the Union filed with the court of appeals for enforcement. The latter decision dealt with refusal to bargain while the court of appeals was considering the Board's earlier action.

The Solicitor General would have us believe that the refusal to bargain in *Winn-Dixie* was not motivated by anti-union animus. However, the Board stated at 56 LRRM 1267 in comparing the *Winn-Dixie* decision to another Board decision:

> Finally, there was no indication of Union animus on the part of the employer in that case. This case is different. Here, we have an employer, who, by its past conduct, has given evidence of its opposition to the policies of the Act.

Respondent contends that the intransigence and extended refusal to bargain make the *Winn-Dixie* case unique, as is indicated by the fact that the Board, although overturned by the Court of Appeals, had ordered the extreme remedy of bargaining regarding the resumption of the discontinued operation, 56 LRRM 1268.

The Solicitor General finally cites *Summit Tooling Co., supra*, a case which is similar, but only superficially similar, to the instant case. *Summit* also involved the closing of a tool manufacturing company that was found to be a "single employer" along with a parent company which remained open. Also, the Board issued a back-pay order patterned after the *Winn-Dixie* formula.

In *Summit*, however, there was clear evidence to the effect that the union had made a request for bargaining prior to the plant closing which was denied by the company. The Board stated at 79 LRRM 1399:

> As Milovich (the Company President) had indicated to Schaunaman (a former employee) on June 8, Summit closed its operations. No notice was given to the Union of Summit's intention to close its operation. However, around the beginning of June, the Union representative had been informed by some unit employees about the possible closing of the operation. After receiving this information, the representative asked for a meeting with Milovich, saying, among other things, that there were a lot of things to be discussed if it were true that Summit was going to close its operation. Milovich replied that he could meet with the representative only in early July.

Referring to the same June 8 incident, the Court of Appeals said at 83 LRRM 2047:

> On that date, Milovich explained to Parks (another former employee) that no obligation remained on his behalf to the laid off men and he would not meet with the Union on this matter because no men were left.

Thus, in *Summit*, the company denied a clear request for bargaining regarding the effects of closing. In the instant case, the Board admits, at page 11 of its Brief to the Sixth Circuit, that the union did not request bargaining until it had been ordered to do so by the decision of the Administrative Law Judge on August 1, 1975, some 8 months after the plant closing.

Of the four decisions cited by the Solicitor General as being in conflict with the decision of the Sixth Circuit in the instant case, only *Summit Tooling* and *Winn-Dixie* conflict, and there the conflict is limited to the remedial portion of the decisions. The Solicitor General cannot maintain that there is any conflict in the substantive law between the instant case and the other decisions which he cites. All reach basically the same conclusion: that an employer, in a partial closing situation, is required to give the union advance notice of its intention to close down and an opportunity to bargain regarding the effects of closing upon the employees. The decision of the Sixth Circuit in the instant case [Appendix A, Petition, p. 2(a)] reached the same conclusion by affirming the Board's finding of an 8(a) (5) violation. The Sixth Circuit's modification of the Board's back-pay remedy does conflict with the formula set forth in *Winn-Dixie* and *Summit Tooling*, but respondent contends that this is not the sort of "real and embarrassing conflict of opinion and

authority" that would justify review on writ of certiorari. Rather, the conflict reflects the long standing Board policy that remedies should be adapted to the circumstances of the individual case, *Ozark Trailers, Inc.*, 161 NLRB 561, 63 LRRM 1265, 1270 (1966).

Other Courts of Appeals have recognized that the Board's remedy should be flexible and patterned in response to the particular circumstances involved. In *NLRB* v *Royal Plating and Polishing Co.*, 350 F2d 191, 60 LRRM 2033 (CA 3, 1965), the Third Circuit denied enforcement of back-pay and bargaining orders, 148 NLRB 59, 57 LRRM 1006, 152 NLRB 76, 59 LRRM 1141. On June 14, 1963, Royal Plating closed down one of its Newark, New Jersey plants without giving the union prior notice and an opportunity to bargain. The Court agreed that the employer was obligated to bargain over the effects of closing but held that there was insufficient evidence to determine whether Royal Plating's conduct amounted to an unfair labor practice. The Court said at 350 F2d 197:

> We direct the Board's attention to events that may have transpired since June 14, 1963. As we read the record, the Union made very little effort to bargain in respect to the effects of the shut-down after the Company's decision was transmitted to the Union. Furthermore, the Company asserts in its Brief that it has continued to bargain "with respect to such questions as were raised by the Union." While these facts, if they be supported by evidence, would not necessarily remedy the refusal to bargain, they, considered with other relevant circumstances, may present a situation in which effectuation of

> the purposes of the Act might not require a remedial order even though there has been a technical violation of the act. *New York Mirror, Division of the Hearst Corp.*, 151 NLRB 110, 58 LRRM 1465 (1965).

On remand, the Board determined that Royal Plating had violated §8(a) (5) of the Act by refusing to bargain over the effects of the plant closing, and it issued the following back-pay order at 63 LRRM 1049:

> In order to recreate as nearly as possible the economic situation that would have prevailed if the Respondent would not have refused to perform its bargaining obligations in 1963, and in order to effectuate the policies of the Act in the labor dispute before us, it is our considered judgment that the Respondent should be ordered to pay its Bleeker Street employees amounts at the rate of their normal wages when last in Respondent's employ, from the date of this Supplemental Decision (September 8, 1966), until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing on employees of the Bleeker Street plant, (2) a bona fide impasse in bargaining; and (3) the failure of the Union to request bargaining within five (5) days of this Supplemental Decision, or to commence negotiations within five (5) days of the receipt of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employee exceed the amount he would have earned as wages from June 14, the day on which respondent terminated the Bleeker Street operations, to the time he secured equivalent employment elsewhere, or August 31, 1963, whichever occurred sooner. We believe that the limited wage payment period specified above, which cannot be protracted by the Union through dilatory bargaining practices, assures a remedial order which is tailored to the needs of the situation presented and does not impose an undue or unfair burden upon the Respondent.

The August 31 date referred to above is the date when Royal Plating closed down its other Newark plant and terminated its operations completely, 63 LRRM 1046. The above Order is nearly identical to the one formulated by the Sixth Circuit in the instant case. That remedy ran from the date that the union requested the company to bargain about the effects of closing until agreement, impasse, failure of the union to commence negotiations after its request, or failure to bargain in good faith (Appendix A, Petition, page 2A).

C. The Solicitor General has failed to demonstrate that the issue involved is of importance to the public as distinguished from that of the parties and has further failed to show that the Sixth Circuit either misapprehended or grossly misapplied the applicable standard of review.

Layne and Bowler Corporation, supra, stands for the proposition that certiorari will be granted only in cases of general public importance and not where import is confined to the parties. At issue in the instant case is one

method of computing back-pay liability pursuant to a Board finding of an §8(a) (5) violation. No substantive rule of law in the field of labor-management relations is involved. The issue is solely remedial. The Board ordered back-pay from the date of closing of Respondent's plant, and the Sixth Circuit modified that order by pushing back the commencement of liability to the date when the Union finally requested bargaining. The Sixth Circuit does not elaborate on its reasons for the modification. Section 10(e) of the Labor-Management Relations Act gives to the Courts of Appeals the power to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." Given the applicable standard of review, one must assume that the Sixth Circuit determined that the Board's remedy did not effectuate the policies of the Act.

Although it has repeatedly affirmed the Board's wide discretion as to remedies, this Court has also made it plain that:

> This is not to say that the Board may apply a remedy it has worked out on the basis of experience, without regard to the circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the act. *NLRB* v *Seven-Up Bottling Co.*, 344 US 344, 349, 73 S Ct 287, 97 L Ed 377 (1953).

Further, the Court's analysis of the remedial provisions of the Act in *Republic Steel Corporation* v *NLRB*, 311 US 7, 11 through 12, 85 L Ed 6, 61 S Ct 77 (1940) is still applicable today.

> This language [Section 10(c) of the Act] should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he has engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such order." We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Co.* v *NLRB*, 305 US 197, 83 L Ed 126, 59 S Ct 206 (1938). See also *NLRB* v *Pennsylvania Greyhound Lines*, 301 US 261, 82 L Ed 831, 58 S Ct 571 (1937). We adhere to that construction.

It was Respondent's argument before the Sixth Circuit that back pay should not begin to accumulate until such time as the union requested bargaining and should continue to accumulate only until agreement or bona fide impasse. Respondent further argued that any back pay which accumulated either beyond or before this period would fail to promote meaningful bargaining for the reason that no bargaining was to take place, according to the Board's original order, until a request for bargaining

was forthcoming from the union. Back pay from the date of Respondent's closing, distribution of tens of thousands of dollars to Respondent's employees, would not promote meaningful bargaining over the effects of closing. It would merely be an attempt by the Board to penalize Respondent for certain unfair labor practices which were found.

The Sixth Circuit, in modifying the Board's Order, was merely exercising its statutory authority under §10(e) of the Act. In so doing, it determined that the Board's order was a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act, *NLRB* v *Seven-Up Bottling Co., supra*, at 346-347. There is nothing to indicate that the Sixth Circuit misapprehended or misapplied that standard of review.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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